UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

KELLY SERVICES, INC.

and Case No. 4−CA−171036

T. JASON NOYE, an Individual

Lea Alvo-Sadiky, Esq.,
for the General Counsel,
Gerald L. Maatman, Jr., Esq. (Seyfarth Shaw LLP), for the Respondent.
Marielle Macher, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

Robert A. Giannasi, Administrative Law Judge. This case was submitted to me by virtue of a joint motion and stipulation pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by maintaining as a condition of employment for all employees an arbitration agreement that (1) requires employees to waive their right to maintain class or collective actions in all forums, whether arbitrator or judicial, with respect to their wages, hours or other terms and conditions of employment; and (2) restricts employee access to Board processes by prohibiting employees from receiving back pay or other monetary compensation through Board proceedings. Respondent filed an answer denying the essential allegations in the complaint. All parties filed briefs in support of their positions.[1]

[1] The parties agreed that their Stipulation of Facts, with attached exhibits, constitutes the entire record in this case and that no oral testimony is necessary or desired.

Based on the stipulation and the stipulated record, as well as the briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation with facilities located throughout the United States, including an office and place of business in East Brunswick, New Jersey, and has been engaged in providing temporary staffing to employers. In conducting its operations during the past 12-month period, Respondent provided services valued in excess of $50,000 to customers located outside the State of New Jersey. At all times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Since at least September 5, 2015, Respondent, on a corporate-wide basis, has maintained as a condition of employment for all employees a "Dispute Resolution and Mutual Agreement to Binding Arbitration" (herein Arbitration Agreement, and in the record as Joint Exhibit 6*)* which includes, inter alia, the following provisions:

> 1. **Agreement to Arbitrate**. Kelly Services, Inc. ("Kelly Services") and I agree to use binding arbitration instead of going to court, for any "Covered claims that arise between me and Kelly Services, its related and affiliated companies, and/or any current or former employee of Kelly Services or any related or affiliated company.
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> 2. **Claims Subject to Agreement**. The "Covered Claims" under this Agreement shall include all common-law and statutory claims relating to my employment, including, but not limited to, any claim for breach of contract, unpaid wages, wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. **I understand and agree that arbitration is the only forum for resolving Covered Claims, and that both Kelly Services and I hereby waive the right to a trial before a judge or jury in federal or state court in favor of arbitration for Covered Claims.** (Emphasis in original)
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> 3. **Exclusions from Agreement**. The Covered Claims under this Agreement do not include claims for employee benefits pursuant to Kelly Services' ERISA plans, workers' compensation claims, unemployment compensation claims, unfair competition claims, and solicitation claims. Any claim that cannot be required to be arbitrated as a matter of law also is not a Covered Claim under this Agreement. Furthermore, nothing in this Agreement prohibits me or Kelly Services

from seeking emergency or temporary injunctive relief in a court of law in accordance with applicable law (however, after the court has issued a ruling concerning the emergency or temporary injunctive relief, both I and Kelly Services are required to submit the dispute to arbitration pursuant to this Agreement). I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB"), the Department of Labor ("DOL") and the Equal Employment Opportunity Commission ("EEOC") or similar state agencies, but I understand that I am giving up the opportunity to recover monetary amounts from such charges (e.g., NLRB or EEOC). In other words, I must pursue any claim for monetary relief through arbitration under this Agreement.

8. **Waiver of Class and Collective Claims**. Both Kelly Services and I also agree that all claims subject to this agreement will be arbitrated only on an individual basis, and that both Kelly Services and I waive the right to participate in or receive money or any other relief from any class, collective, or representative proceeding. No party may bring a claim on behalf of other individuals, and no Arbitrator hearing any claim under this agreement may: (i) combine more than one individual's claim or claims into a single case; (ii) order, require, participate in or facilitate production of class-wide contact information or notification of others of potential claims; or (iii) arbitrate any form of class, collective, or representative proceeding.

16. **Savings Clause & Conformity Clause**. If any provision of this Agreement is determined to be unenforceable or in conflict with a mandatory provision of applicable law, it shall be construed to incorporate any mandatory provision and/or the unenforceable or conflicting provision shall be automatically severed and the remainder of the Agreement shall not be affected. Provided, however, that if the Waiver of Class and Collective Claims is found to be unenforceable, then any claim brought on a class, collective or representative action basis must be filed in a court of competent jurisdiction, and such court shall be the exclusive form for such claims.

All documents attached as exhibits are true and correct copies of the documents described. The parties agree to the authenticity of the exhibits.

Statement of Issues

Based on the above factual stipulations, the parties agree that the legal issues to be resolved in this matter are whether Respondent's maintenance of the Arbitration Agreement described above violates Section 8(a)(1) of the Act because it (i) interferes with Respondent's employees' rights to engage in protected concerted activity by requiring them to waive their right to maintain class or collective actions in all forums,

whether arbitral or judicial, with respect to their wages, hours or other terms and conditions of employment; and (ii) interferes with and restricts employees access to Board processes by prohibiting Respondent's employees from receiving backpay or other monetary compensation through Board proceedings.

Analysis

Waiver of Collective Actions

The Board has held that employer rules prohibiting employees, as a condition of employment, from pursuing collective actions in arbitrations or law suits violate Section 8(a)(1) of the Act because they interfere with collective rights set forth in Section 7 of the Act. *D.R. Horton*, *Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part, 737 F. 3d 344 (5th Cir. 2013); and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) enf. denied 808 F. 3d 1013 (5th Cir. 2015), cert. granted 137 S.Ct. 809 (2017). See also *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), cert. granted 137 U.S. 809 (2017).

Paragraph 8 of the Arbitration Agreement, which is a condition of employment, clearly precludes employees from pursuing employment-related class or collective actions both in arbitrations and in court proceedings. Thus, the Board's rulings in *D.R. Horton* and *Murphy Oil* require me to find that the Arbitration Agreement violates Section 8(a)(1) of the Act.[2]

Restriction Against Filing Board Charges That Could Provide Monetary Remedies

The Board has held that a mandatory arbitration policy such as the one in this case discussed above also violates Section 8(a)(1) if employees "would reasonably believe that the policy interferes with their ability to file a Board charge or otherwise access the Board's processes." *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. 1 (2016). In that case, the employer argued, as Respondent does here, that another part of the policy provided an adequate defense to the alleged violation because it permitted employees to file charges with the Board. But the Board rejected that defense because, overall, the policy broadly required arbitration for all employment-related disputes, and the reference to filing charges made the policy ambiguous. The Board noted that any ambiguity had to be construed against the promulgator of the policy, particularly because employees reading the policy are lay people, not lawyers able to make sophisticated distinctions such as those set forth in the policy. Thus, in finding a violation, the Board concluded that employees could reasonably read the retention of the right to file Board charges as "illusory." Id. slip op. 2. As the Board further stated (Id. slip op. 3):

[2] I am bound by existing Board law unless reversed by the Board itself or by the Supreme Court. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004). I am also bound by the Board's rejection, in *Murphy Oil* and *D.R. Horton* of the arguments made in Respondent's brief to me in support of the dismissal of this aspect of the complaint.

> To be meaningful, the right to file charges with the Board must entail the rights to have the Board exercise its statutory powers under Section 10 of the Act: i.e., to investigate the charge, to determine its merits, and to pursue appropriate relief through the Act's procedures. An employer may *not* lawfully require individual employees to arbitrate unfair labor practice claims that would otherwise be resolved by the Board under the Act's procedures. To do so necessarily interferes with employee's statutory right of access to the Board.

Ralph's Grocery governs this case. Here, as in *Ralph's Grocery*, the sweep of the broad mandatory arbitration language trumps any preservation of the right to file Board charges. The mandatory arbitration language is set off in bold type, unlike the rest of the policy. The ambiguity in the reading of the broad overall policy by the lay person employees here is the same as it was in *Ralph's Grocery*. Thus, here, as in *Ralph's Grocery*, the Arbitration Agreement's token recognition of the right to file Board charges is "illusory." And the overall Agreement can reasonably be read to inhibit the filing of Board charges. See also *Lincoln Eastern Management*, 364 NLRB No. 16, slip op. 2-3 (2016).

This is an even stronger case for a violation than *Ralph's Grocery*. Paragraph 3 of the Arbitration Agreement permits employees to file Board charges, as it did in *Ralph's Grocery*, but it also explicitly prohibits them from recovering money damages in a Board proceeding, a restriction that was not present in *Ralph's Grocery*. It is difficult to envision how, once the Board's processes have been invoked, the Arbitration Agreement could preclude the Board from exercising its full statutory powers, including its remedial authority. The Board's remedies, of course, often provide for back pay to make employees whole for discrimination and other unfair labor practices found by the Board. Back pay is a specific statutory remedy set forth in Section 10(c) of the Act. Because the Board enforces public, not private, rights, it is doubtful that any private rule could preclude the Board from providing a monetary remedy authorized by a statute of the United States. But the bottom line here is that a reasonable reading of the Arbitration Agreement's prohibition against monetary remedies from the Board is an added inhibition against the filing of charges. Why file a charge in a case where back pay is the normal remedy if you cannot get monetary relief? Accordingly I find that the Arbitration Agreement precludes full recourse to the Board and thus violates Section 8(a)(1) of the Act in this additional respect.

Although it lists four alleged reasons for the legality of the Arbitration Agreement, Respondent's brief does not provide a persuasive defense to this part of the complaint. All of its reasons run contrary to *Ralph's Grocery*. Its first reason is hard to understand, but, to the extent that it suggests that if "no back pay is sought" in a Board proceeding the Arbitration Agreement is "lawful" (Br. 11-12), it fails to account for the restriction of a full Board remedy in those cases where back pay is a normal remedy. The second reason—that the Agreement allows for the filing of charges (Br. 12-13)—is likewise contrary to the rationale of *Ralph's Grocery* that preservation of the right to file charges is illusory where the thrust of the unlawful policy is to require arbitration in all employment-related disputes. The significance of Respondent's third reason—that

denying statutory back pay relief to employees is permissible because back pay is a remedy and not a procedure (Br. 13-14)—escapes me. Respondent seems to allege that because a back pay remedy is not guaranteed its denial to employees who are nevertheless free to file charges does not interfere with Board processes. But, although nothing in life is guaranteed, a back pay remedy is the normal remedy where an appropriate violation is found and circumstances warrant it. Nor is there any distinction in Board jurisprudence that permits access to Board processes and exclusion of Board remedies where appropriate. This is made clear by the Board's language in *Ralph's Grocery,* set forth above, that access to Board processes includes the right to "pursue appropriate relief" through the Board. A back pay remedy is thus part of Board processes. Respondent final reason—that because deferral to arbitration is permitted in some circumstances, it should be permitted here (Br. 14-19) is without merit. As the Board made clear in *Ralph's Grocery*, deferral to arbitration is a discretionary policy of the Board that has been used only when the arbitration provision has been the result of a collectively bargained agreement, which is not the case here. 363 NLRB No. 128, slip op. 3.

CONCLUSIONS OF LAW

1. The Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory and binding arbitration policy which required employees to resolve employment-related disputes exclusively through individual arbitration proceedings and to relinquish any right they have to resolve such disputes through collective or class action.

2. The Respondent violated Section 8(a)(1) of the Act by maintaining a mandatory and binding arbitration policy that employees reasonably would believe bars or restricts their right to file charges and seek remedies, including back pay where appropriate, before the National Labor Relations Board.

3. The above violations constitute unfair labor practices within the meaning of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and deist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act. As I have concluded that the Arbitration Agreement is unlawful, the recommended order requires that the Respondent revise or rescind it, and advise its employees in writing that said rule has been so revised or rescinded.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted

ORDER

The Respondent, Kelly Services, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing a mandatory arbitration policy that waives the right of employees to maintain class or collective actions in all forms, whether arbitral or judicial.

(b) Maintaining or enforcing a mandatory arbitration policy that employees reasonably would believe bars or restricts the right of employees to file charges and seek remedies, including back pay where appropriate, before the National Labor Relations Board.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the Arbitration Agreement to make it clear to employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions, or to file charges and seek remedies, including back pay where appropriate, before the National Labor Relations Board.

(b) Notify the employees of the rescinded or revised Arbitration Agreement to include providing them a copy of the revised agreement or specific notification that the agreement has been rescinded.

(c) Within 14 days after service by the Region, post at all facilities where the Dispute Resolution and Mutual Agreement to Binding Arbitration applied copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site,

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by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 4, 2016.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., May 23, 2017.

Robert A. Giannasi
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose a representative to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce a mandatory arbitration policy that waives your right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT maintain a mandatory arbitration policy that you reasonably could believe bars or restricts your right to file charges and seek remedies, including back pay where appropriate, before the National Labor Relations Board.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce you in the exercise or the rights guaranteed you by Federal labor law.

WE WILL rescind or revise the Dispute Resolution and Mutual Agreement to Binding Arbitration to make it clear to all employees that the agreement does not constitute a waiver of their right in all forums to maintain class or collective actions and does not restrict their right to file charges and seek remedies including back pay where appropriate, before the National Labor Relations Board.

WE WILL notify all employees of the rescinded or revised Dispute Resolution and Mutual Agreement to Binding Arbitration, and WE WILL provide them with a copy of the revised agreement or specific notification that the agreement has been rescinded.

KELLY SERVICES, INC.
(Employer)

DATED: _____BY: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

615 Chestnut Street, 7th Floor, Philadelphia, PA 19106-4404

(215) 597-7601, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/18-CA-142795 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (215) 597-5354.